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No. 86-1944

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUNG O. KWOUN, *et al.*,

Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, *et al.*,

Respondents.

OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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SOUNG O. KWOUN, et al.,

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SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, et al.,

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On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY MEMORANDUM FOR PETITIONERS

This Reply Memorandum will address primarily the contentions raised by the United States in its Brief in Opposition, particularly as they relate to the position of the government taken in No. 86-1145, Patrick v. Burget. We will also address briefly the arguments made in the

Brief in Opposition of the other respondents.

I.

The Response of the United States

We urge that certiorari should be granted in this case along with certiorari in Patrick v. Burget and that the cases be set down for oral argument together. There is a common question underlying both cases: i.e., whether and to what extent private individuals who are members of peer review organizations established under either federal law, as here, or state law, as in Patrick, should be granted immunity from liability under federal civil rights or anti-trust statutes because they have been given functions related to the enforcement of federal or state law.

The government urges that certiorari should be granted in Patrick to decide

whether the "state action" doctrine immunizes peer review organizations' members from anti-trust liability because the actions they have taken are done under the auspices of state law.[1] Thus, review is urged to decide whether "a state may . . . give immunity to private parties" in a case involving "an attempt by private parties, not governmental units, to achieve immunity from Sherman Act liability."[2] In the present case, the question is whether the same persons, viz., private physician members of peer review organizations, should be given absolute immunity from liability under federal civil rights statutes because

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[1] Compare Tambone v. Memorial Hospital for McHenry County, Inc., ___ F.2d ___, 56 U.S. Law Week 2129 (7th Cir., July 14, 1987), with Marrese v. Interqual Inc., 784 F.2d 373 (7th Cir. 1984).

[2] Brief for the United States As Amicus Curiae in No. 86-1145, pp. 7-8.

they have been given a role under federal law in determining whether persons should be excluded from Medicaid reimbursement programs.

In its Brief in Opposition in the present case the federal defendants decline to address this issue for reasons that are not clear.[3] They argue essentially that the question presented here will not recur because of changes in the statute and regulations that provide more procedural protections during the peer review process; but this argument is inaccurate and irrelevant. The claim here is that the actions of the members of the peer review organization were motivated by racial bias towards the petitioner, and that the federal

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[3] As we noted in the petition for a writ of certiorari, at oral argument in the court of appeals the United States took the position that the PRO members should only have qualified immunity.

defendants failed to ensure that the peer review defendants had provided petitioner with due process of law in making their recommendation. The fact that such actions are now subject to certain procedures will not in any way whatsoever lessen the possibility that the motives for initiating the actions were illegal under the civil rights statutes. Moreover, the notice and opportunity to be heard provisions of the regulations existing at the time were ignored.

Thus, the basic question of the extent to which courts should extend immunity to private persons who serve a role in an administrative procedure is still raised by the present case. It is an issue that has not been decided by this Court[4] and, we submit, is an

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[4] This Court's only ruling to date was to summarily affirm without opinion a lower court's holding that the medical

important and recurring one that has lead, as demonstrated by our petition for a writ of certiorari, to substantial confusion in the lower courts.[5] In addition, the question of the limitations of Butz v. Economou, 438 U.S. 478 (1978) as it relates to the federal defendants is not changed by the promulgation of new regulations. Thus, this case does not involve a "straight-forward application" of Butz, as the SEMP PSRO respondents suggest.

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peer review statute was not unconstitutional on its face. Association of American Physicians and Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill. 1975), aff'd, 423 U.S. 975 (1975).

[5] Cf. Cassim v. Bowen, 824 F.2d 791, 796 (9th Cir. 1987), for a description of the disagreement between the circuits as to the nature of the constitutional right involved in the denial of Medicaid reimbursement.

II.

The Response of the Private Respondents

The bulk of the private respondent's Brief in Opposition attempts to demonstrate that there is no conflict between the circuits. We will not repeat what we have already said in the petition for writ of certiorari but simply wish to reemphasize that there is a clear conflict between the decision of the Eighth Circuit and a number of state court decisions, including decisions of the highest state courts of several states, as to whether peer review organization members should have absolute or qualified immunity. See cases cited in the Petition for A Writ of Certiorari, p. 35, n. 24. This is an independent basis for granting the petition and again illustrates the importance and recurring

nature of the issues presented.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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